APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-2141

NEWSPAPER, NEWSPRINT, MAGAZINE, AND FILM DELIVERY DRIVERS, LOCAL UNION NO. 211, *Appellant*,

v.

PITTSBURGH PRESS COMPANY.

Appeal from the United States District Court for the Western District of Pennsylvania.

MEMORANDUM OPINION SUR MOTION FOR INJUNCTION PENDING APPEAL

Present: SEITZ, *Chief Judge*, and ALDISERT and ROSENN, *Circuit Judges*.

Before the court is a motion for injunction pending appeal filed in accordance with F.R.A.P. 8, originally presented before the resident Circuit Judge in the Western District of Pennsylvania who heard oral argument thereon on December 16, 1972, and by him referred to a panel of this court for disposition.

We hold that the December 14, 1972, order of the district court denying the request for preliminary relief is an appealable order although styled by the court as a denial of "a temporary restraining order." Appellant's complaint

was filed December 8, 1972, requesting preliminary and permanent injunctive relief from work changes proposed by the company outlined in a letter dated December 1, 1972. On December 8, 1972, the court issued an order fixing a hearing on a preliminary injunction for December 11, 1972. The defendant was given proper notice thereof. The case was then assigned to another judge who set a hearing for December 13, 1972.

At the beginning of this hearing, the court stated, "Well now, I will give you a hearing on a temporary restraining order. You have asked for a hearing on a preliminary injunction, but I think you know that the other side is entitled to twenty days to file an answer to your complaint for a permanent injunction and if you want a hearing on the preliminary injunction, I will set it for some time in January, the week of January 8."[1]

On a request for a preliminary injunction the relevancy of pleadings necessary for a permanent injunction is at best evanescent; in this case, it is non-existent. Thus, pleading rules formed no bar to a hearing on appellant's request. The court further reasoned that the earliest that plaintiff could be heard on its request for a preliminary injunction was the week of January 8, 1973. Thus, faced with a dispute over a collective bargaining agreement expiring on December 31, 1972, the court ruled that the union could not have a hearing on a preliminary injunc-

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[1] It is possible that the district court was misled by the position taken by defense counsel:

> We want to reserve the right to file an answer. If this matter is to be treated as a motion for preliminary injunction, we would certainly want the transcript of the court so that we may prepare a proposed findings of fact and conclusions of law. I would ask for the opportunity to prepare that as well as an extensive brief and memorandum of the law on these issues.

[Record, at 78.]

tion until eight days after the contract expired. We find it difficult to accept that the District Court for the Western District of Pennsylvania, consisting of twelve active and senior districts judges could not entertain a petition for a preliminary injunction filed December 8, 1972, until thirty days thereafter.[2] Moreover; we observe that the life of a temporary restraining order is ten days. Unless there was consent by the parties, additional court action was mandated prior to January 8, 1973.

Because there was no effort by the plaintiff to request relief without notice, and it appearing that the defendant was given timely notice of the hearing and participated actively therein in cross-examination, in the presentation of evidence and in oral argument, we are unwilling to construe the proceedings as a hearing on a temporary restraining order. The relief requested was for a preliminary injunction and the denial of that relief, irrespective of the label attached thereto by the district court, was a denial of a request for a preliminary injunction which constitutes an appealable order. 28 U.S.C. § 1292(a)(1).

The facts are not in dispute. Following changes, authorized by arbitration awards which affected other labor unions of the Pittsburgh Press, the company sent a letter to the union on December 1, 1972, suggesting job changes. The company contends:

> Attendant to this elimination of the [printing] press are certain other changes resulting therefrom directly at issue here, i.e., the elimination of two jobs on the loading dock which work directly off that press. In addition, circulation adjustments require the elimination of one of the three weekend trips to Fairmont, West Virginia, and the elimination of helpers on certain weekend delivery trucks.

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[2] Although that court operates under the individual calendar system, we have previously observed that the hearing judge was not the original judge to which the case was assigned.

> These changes are necessitated because of the disastrous effects the two-week strike of the Pressmen's Union and the eighteen-week strike of the Printer's Union have had on the circulation and advertising of the newspapers. [Description of circulation and advertising losses omitted.] Total payroll costs for the employees represented by appellant union have risen in excess of 125%. Similar increases in employee-count and payroll costs have been gained by employees represented by other unions at appellee's paper.
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> It is obvious from the above that the simple changes planned by appellee in the instant case are not only necessary but are vital to the future of viable newspapers in the City of Pittsburgh.

[Appellee's brief, pages 4-5.]

This litigation therefore, concerns "the elimination of two jobs on the loading dock" and "elimination of one of three weekend trips to Fairmont, West Virginia, and the elimination of helpers on certain weekend delivery trucks." It would appear that resolution of this dispute in the district court at the final hearing will require an accommodation of two sections of the collective bargaining agreement between the parties that expires December 31, 1972.

Appellant relies on Section 14:

> During the processing of a grievance, business shall be continued without interruption in a normal and orderly manner and the matter or matters in dispute, except cases of discipline resulting from a serious offense, shall revert to the status quo prevailing immediately prior to the time the grievance arose until a final decision of the matter or matters at issue shall have been reached.

Appellee relies on Section 18:

> The Company shall be the judge of the number of men to be employed and shall have the right to lay

> off. (This right is not superseded or abridged by any other Section or provision of this Contract or by any provision of this paragraph.)

Appellant contends that although the company "shall be the judge of the number of men to be employed and shall have the right to lay off," this can only be done after arbitration if the proposed action is considered a grievance by the union; that if the union considers it to be a grievance and gives notice, then it must be processed to arbitration during which the status quo shall be maintained under Section 14.

Appellee contends that the language of Section 18 controls absolutely, arguing that it has the right to lay off, and that this right is "not superseded or abridged by any other Section or provision" of the contract. Whatever appeal this argument may have had prior to the hearing, the district court has held otherwise, apparently upon a concession made by the appellee:

> At the hearing, the plaintiffs presented testimony that the defendant intended to change or alter its delivery routes because of decreased circulation. The defendant presented testimony that no one would be laid off, but there is a possibility of a decrease in overtime work and a change in job assignments. *The parties agree that the questions heretofore mentioned are arbitrable.*

We view as significant this finding by the court. Once it is found that the issues are arbitrable, then it is arguable that the matter is properly a grievance subject to the status quo section. In the present posture of this appeal, we do not resolve this issue. We hold simply that at this time we cannot rule, without more, that Section 18 is absolutely controlling, precluding any possibility of applying the status quo section.

It is necessary, however, that we relate this finding to other findings of the court: "The court therefore, upon the evidence presented to date, finds that neither the plaintiff nor any of its members will suffer irreparable harm and the defendant will suffer more from the granting of a temporary restraining order." Accepting the premise that the issues are arbitrable, we cannot, at this stage, rule, as a matter of law, that violation of the status quo during arbitration is not in itself an irreparable harm to the plaintiff.

The plaintiff is a union. The status quo section obviously reflects a union victory at the collective bargaining table which created the 1972 agreement. The union contends that any rupture of this status constitutes irreparable harm. Self-descriptive by nomenclature, irreparable harm, as a ground for equitable relief, is that what cannot be repaired, restored, put back again, atoned for, but may exist although the injury is compensable in damages and is not very great where there is actual and substantial injury of such character that the law cannot give adequate compensation or fair or reasonable redress.[3] *De Luxe Motor Cab Co.* v. *Dever*, 252 Ill. App. 156.

Accordingly, we hold that whether the district court erred in its finding of irreparable harm is an arguable question; one which will be resolved at the decision on the merits of this appeal. Pending disposition thereof, we are constrained to grant an injunction pending appeal.

We are influenced by the reality that the contract expires in less than two weeks. It is the thrust of appellant's argu-

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[3] *Typographical Union* v. *Publishers Ass'n.*, (E.D. Mich.), 81 LRRM 2797, 2798 (Nov. 14, 1972), states:

> The Court also believes that for the status quo provision to have any meaning at all, it must be read apart from the provision requiring that all disputes arising out of the operation of the agreement be referred to the joint standing committee. To read it otherwise would render the provision a nullity, particularly when the arbitration process drags on, as it often does, for months.

ment that the loss of the status quo is irreparable. Although we do not decide that issue, we will preserve that status. To hold otherwise would dissipate completely the very status which is central to this litigation and also effectively deprive appellant of the opportunity of litigating the issue.

Notwithstanding the foregoing, the company offers the sound argument that should it prevail ultimately at arbitration it will have incurred substantial out-of-pocket costs pending arbitration. "It is estimated by the appellee that the issuance of an injunction will result in $1300.00 per week of unnecessary costs." [Appellee's brief, page 14.] We believe that the company should not be exposed to substantial losses if improvidently prevented from instituting the work changes at the desired time schedule.

We will therefore require appellant to file a special surety bond in double amount of the possible losses to which the company may be exposed by December 31, 1972, directly relating to work schedules of those members of plaintiff union described in its letter of December 1, 1972. Using the estimates furnished by appellee in its brief, page 14, we calculate this loss to be a total of $2600.00 for a two-week period. Appellant will be required to post this bond with the Clerk of the district court. Should the company prevail at arbitration on the issues which constitute the subject matter of this specific litigation, it shall have direct recourse to this surety bond for those losses actually sustained by it between December 17, 1972, and December 31, 1972, resulting from its being prevented from implementing the work changes of members of plaintiff union described in its letter of December 1, 1972, to the union.

Concurring and dissenting opinion by Judge Rosenn:

I agree with the majority that the filing of an answer is unessential to a hearing on an application for a preliminary injunction. Under the circumstances described in the

majority opinion, consideration of the hearing in the district court as an application for a preliminary injunction is not inappropriate. I agree therefore that the order before us is appealable. I dissent only because the limited issue before us on this motion for injunctive relief pending appeal is whether there was a clear abuse of discretion by the district court. Since the evidence adduced is unrefuted that no employees constituting members of the appellant union will be laid off and the change in operations of the employer involves only a reshifting of personnel to other jobs, I am unable on motion only to hold that the district court abused its discretion that upon the evidence presented to date "that neither the plaintiff nor any of its members will suffer irreparable harm and the defendant will suffer more from the granting of a temporary restraining order".

Order

For the reasons set forth in the foregoing memorandum opinion, it is ORDERED that pending disposition of this appeal the Pittsburgh Press Company, its officers, agents, and representatives be and are hereby restrained from implementing the work changes described in its letter of December 1, 1972, to Newspaper, Newsprint, Magazine, and Film Delivery Drivers, Local Union No. 211. This Order shall be conditioned upon appellant's deposit in the amount of $5200.00 with the Clerk of the United States District Court for the Western District of Pennsylvania subject to the conditions set forth in the foregoing memorandum opinion.

BY THE COURT,

/s/ ALDISERT, J.
Circuit Judge

Dated: December 26, 1972